Privy Council Appeal No. 79 of 1925.

Bengal Appeal No. 9 of 1924.

Banku Behary Chatterji - - - - - - *Appellant*

v.

Naraindas Dutt and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1927.

Present at the Hearing:

LORD PHILLIMORE.
LORD DARLING.
MR. AMEER ALI.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD PHILLIMORE.]

This case involves two questions upon the Limitation Act. One Sarat Chunder Dutt effected four mortgages upon his various properties. The first encumbered two properties only; the second and third encumbered the same two properties and thirty-four others; the fourth, which has given rise to the present appeal, encumbered all thirty-six and nominally at any rate, some three others.

The fact that there were these additional properties might in one view have some bearing upon the points to be decided, and the counsel for the respondents insisted upon them; but in their Lordships' view they are so shadowy and uncertain that they may be thrown out of consideration in the present case.

The date of the fourth mortgage was the 21st December, 1900—the fourth mortgagee being the present appellant.

In 1903 the mortgagor partly paid off the fourth mortgagee by assigning to him certain mortgages valued at R. 35,000 in part satisfaction of his claim.

In 1901 the first mortgagee brought a suit on the Original Side of the High Court of Calcutta, making the three subsequent mortgagees and the mortgagor parties and obtained the usual preliminary decree on the 27th August, 1902, in respect of his mortgage and the other mortgages and a final decree on the 4th February, 1905.

In August, 1905, the two properties, which were the subject of the first mortgage, were sold, and sufficient was realised to pay off the first mortgagee and leave some surplus.

In February, 1917, the properties subject to the second and third mortgages, were sold, and their proceeds with the balance left from the previous sale about equalled what was due, possibly not quite enough to pay them. But apparently the second and third mortgagees were satisfied.

The fourth mortgagee took no further steps. In April, 1919, the mortgagor died, leaving two sons, the respondents, numbers 1 and 2, and on the 20th May, 1919, the appellant, on the suggestion that the mortgagor was dead, that his two sons and his widow represented him, and that he had left property outside the limits of the Original Jurisdiction of the High Court, and within the jurisdiction of the District Court at Hoogly, made an application that satisfaction of his judgment might be entered in respect of the sum of R. 35,000, and that he might be at liberty to execute his decree for R. 82,725, being the balance of principal and interest against the widow and the two sons, and that for this purpose the proper papers should be transmitted to the District Court at Hoogly.

Upon this suggestion an administrative order according to the cursus curiae was made by the registrar and supported by a certificate of a judge stating that satisfaction had not been made of the full judgment debt, and that no order had been made in his court for execution of the decree, and fixing the necessary costs of the certificate.

Thereupon the appellant applied to the Subordinate Judge at Hoogly for an order for sale of the properties within the jurisdiction which were alleged to have belonged to the deceased mortgagor, and notice of this application was given to the respondents and the widow.

Their proper course, there is no doubt, was to raise any objection they might have in the court of the Subordinate Judge. Instead, however, of so doing, they applied by petition to the High Court, raising among other points the following—that the widow was not liable as a representative of her deceased husband, that the properties sought to be seized and sold were not his at his death, but had been given to the widow, and they raised the question of the Limitation Act.

Thereupon by consent the order for transmission was amended by striking out the widow and modifying the claim against the respondents so as to make it clear that they would be only liable in respect of property of the deceased which had come to their hands, and the registrar's order being so amended, the respondents

withdrew from opposition to the order for transmission from the High Court to the District Court.

The case having thus got regularly into the District Court, the respondents then renewed their objection on the Limitation Act, and the Subordinate Judge delivered judgment against them, being of opinion that the decree holder had not lost his right to have execution, but this judgment was reversed by the High Court—hence the present appeal.

Upon the first question to be decided, their Lordships have little doubt that the decision of the High Court was right. The article of the Act dealing with this question is thus expressed in tabular form :—

Description of Application.	Period of Limitation.	Time from which Period begins to run.
183.—To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right : Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

The rights of the appellant to enforce the decree had all to be exercised within twelve years from its date—that is, twelve years from the 4th February, 1905—and he took no step till 1919.

It is idle to say that he was waiting for previous mortgagees to take steps. After decree every party to a suit is an actor and can take steps to enforce the decree. And if this is true in other cases, so especially is it true when it is a case of a mortgagee, the amount of whose debt has been ascertained and decreed.

If the other mortgagees were so slow in exercising their rights as to imperil his, he ought to have taken action earlier.

Then it is suggested on his behalf, that he could not have a personal decree till all the mortgaged properties had been exhausted by sale. This is true, but it does not mean that he could first wait till just short of twelve years before selling and then take another period just short of twelve years for a personal decree.

His right to a personal decree accrued (to use the words of the Act) along with his other rights, when the final decree was made. If he wished to exercise it in time, he must also take timely steps for those proceedings which were a necessary preliminary.

The second question is more difficult, and their Lordships have been in considerable doubt about it. But upon the whole they think that the decision of the High Court cannot be disturbed.

The circumstances of the case are very special and not likely to occur again. It was decided by the High Court of Calcutta in the case of *Chutterput Singh* v. *Sait Sumari Mull* (I.L.R. 43, Calcutta, p. 903, a Full Bench decision of the year 1916, that an application for transmission of a decree from the High Court to a District Court was not by itself a revival of the decree within the meaning of the Act inasmuch as it was a mere ministerial act of an officer of the Court and not the judicial act of a judge.

Their Lordships have considered that case, and they think that it was rightly decided. But it is said that in the present case the action of the respondents in applying by petition to the High Court, and thereafter agreeing to the consent order, took the amended order of transmission out of the class of ministerial orders and made it a judicial order. Their Lordships will examine this contention.

Under the present and regular practice, the judgment debtor has no notice of the application for the order of transmission. His first information is when he gets a notice from the Court to which the case has been transferred and is required to show cause why the decree should not be executed by that Court against him. But as it appears from the narrative in the case cited, there was at one time a procedure in the High Court of Calcutta, a procedure not authorised by the Code, under which the judgment debtor had notice of the application for transmission and presumably could appear and oppose it.

Possibly the practitioner in the present case had this idea in mind ; but he was mistaken, and he went near to imperil his clients' case.

It remains however, that the order of transmission would be rightly made ex parte and as a ministerial act.

Treating it otherwise, the practitioner raised all the defences which he could and should raise at the later stage. Then by consent, the instrument of transmission was rectified in certain particulars. First of all the widow was struck out. The omission of her name did not concern the other respondents and may be taken as her objection and not theirs. Secondly, the order was amended and rightly amended to show that the respondents were only liable to the extent (if any) of the property within the District which had come to their hands.

This was little more than putting the order for transmission into the correct form, in which it ought to issue, leaving all objections of substance to be raised in the District Court.

Then it is said that the instrument professes to be an order, and reliance is placed on the words " it is ordered that the said defendant . . . be at liberty to execute the said decree ", and it is said that these words are repeated in the amended form, as the result of the consent order.

To this the answer made in the court below seems sufficient. Accompanying the order of transmission and a necessary companion to it is the certificate of the judge of the High Court, and he certified that " no order had been made by this court for execution of the said decree."

In the view of the High Court, the operation of the consent order was limited to the removal of certain preliminary objections which, strictly speaking, the respondents should have urged in the District Court, but which having been urged in the High Court, became an obstacle to be removed, and which the decree holder was glad to have removed, but which could only be removed from the file of the court by a consent order.

Their Lordships are unable to dissent from this view, and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

BANKU BEHARY CHATTERJI

v.

NARAINDAS DUTT AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1927.